IN THE

SUPREME CC 'RT OF THE UNIT ED STATES

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

October Term, 1979

No. 79-1463

CARYL M. KLINE, ROBERT E. CASEY,
FRED M. HEDDINGER, WILLIAM F. JACOBS, JR.,
JOHN D. KILLIAN, JACQUE D. ANGLE, FRANCIS MORAN,
J. HENRY EISENHART, BENJAMIN L. STACKOWISKI,
SAMUEL CORRADO, RICHARD C. HARRIS,
and the
PUBLIC SCHOOL EMPLOYES' RETIREMENT BOARD,
Petitioners

v.

MARGARET ANNE BLAKE, A Minor, by
JAMES BLAKE, Her Guardian,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Gordon W. Gerber
Arthur H. Rainey
Fred T. Magaziner
Richard A. Deak
Attorneys for Respondent

DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3400

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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QUESTION PRESENTED

Should the Supreme Court allocate its resources to review an interlocutory decision of a Court of Appeals which remands the case to the district court for the purpose of augmenting a deficient record when the decision was correctly based on established Eleventh Amendment standards?

RESTATEMENT OF THE CASE

Respondent is satisfied with the petitioners' Statement of the Case, except insofar as that Statement recites "facts" outside the record. There having been no discovery in the case and no hearings of any kind, the only "facts" of record are the various provisions of the Public School Employees' Retirement Code.

ARGUMENT

In Keeping with the Supreme Court's Tradition of Requiring a Full and Complete Factual Basis Before Deciding a Constitutional Issue, the Court Should Deny Petitioners' Request to Review This Interlocutory Decision of the Third Circuit.

Petitioners want this Court to review a constitutional issue on a record which the Court of Appeals described as "deficient." *Blake v. Kline*, 612 F.2d 718, 720 (3rd Cir. 1979). This Court should refuse to do so.

The decision below was "clearly interlocutory." Brief for Petitioners at 11 n. 14. This Court has always been extremely reluctant to review interlocutory decisions and will usually not review a Court of Appeals' interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T&K R. Co.*, 148 U.S. 372, 384 (1893).[1]

Petitioners have shown no inconvenience or embarrassment to justify the interlocutory review they seek. Moreover, the Third Circuit's decision was not only interlocutory; it did not even dispose of the issue upon which petitioners base their petition. This Court has consistently refused to review interlocutory decisions, preferring instead to review cases after a full and complete record has been established. In light of this tradition, it would be anomalous for the Court to grant review of an interlocutory decision which was based solely on the ground that the record was deficient as to the very issue the Court has been asked to review.

The Court has been especially vigilant in requiring a full and complete record as a predicate for the adjudication of novel and serious constitutional issues. *Estelle*

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1. *See also Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Hamilton Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

v. Gamble, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). The "Court has often refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955). Even after oral argument, the Court has found it necessary to dismiss a writ of certiorari as being improvidently granted when it became apparent "that the record [was] not sufficiently clear and specific to permit decision of the important constitutional questions involved in the case." *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968).

Eleventh Amendment issues, in particular, require a full and complete record. As the Court commented in *Ex parte New York*, 256 U.S. 400, 500 (1921), "It is now established that the [applicability of the Eleventh Amendment] is to be determined . . . by the essential nature and effect of the proceeding as it appears from the entire record." Because the most important factor in deciding an Eleventh Amendment issue is whether a judgment would necessarily have to be paid directly out of the general state treasury, *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), the record in an Eleventh Amendment case must contain all relevant facts as to the effect on the state treasury of a judgment for plaintiff. The record in this case, however, contains no evidence whatsoever, other than the provisions of the Public School Employees' Retirement Code, on the question of how a judgment for plaintiff would affect the state treasury. Indeed, the case was remanded solely for the purpose of creating a more complete record. 612 F.2d at 720.

Without an adequate record on the basic question whether a judgment for plaintiff would "to a virtual certainty be paid from state funds," *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), the Court can not adequately review the Eleventh Amendment issue.

Because the Court of Appeals Correctly Applied a Well Defined Body of Case Law, the Supreme Court Should Deny Petitioners' Request for Writ of Certiorari

The Court has held that when an action is in essence one for the recovery of money from the state, the Eleventh Amendment applies, *see, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); but when an action would have only an ancillary effect on the state treasury, the Eleventh Amendment does not operate. *Edelman, supra*. The Court of Appeals has correctly applied this rule. It held that "The most important factor in the determination of eleventh amendment immunity is whether judgment will have to be paid from the treasury." 612 F.2d at 723. After reviewing the skeletal record, the Court of Appeals ruled that the Eleventh Amendment issue could not be decided until the record made clear the extent to which, if at all, a judgment for plaintiff would in fact have to be paid out of the general state treasury.

Because the Third Circuit correctly applied a well developed body of case law, there is no need for this Court to allocate its limited resources to a review of the Court of Appeals' decision.

The Decision of the Court of Appeals Is Not Inconsistent with the Decision of the Court of Appeals for the Second Circuit in *Fitzpatrick v. Bitzer*

The decision of the Third Circuit to remand the case for the purpose of discovery is not inconsistent with the decision of the Court of Appeals for the Second Circuit in *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2nd Cir. 1975), *rev'd in part*, 427 U.S. 445 (1976). *Fitzpatrick* was decided only after a hearing on the merits. The *Fitzpatrick* court, therefore, had a full and complete record upon which to base its decision. Consistent with the

Fitzpatrick decision, the Third Circuit ruled that the *Blake* record must be augmented before a decision on the Eleventh Amendment issue could be made. Because *Blake*, unlike *Fitzpatrick*, reached the appellate court before an adequate record had been established, the Third Circuit could not finally resolve the Eleventh Amendment issue as did the court in *Fitzpatrick*. Thus, the Third Circuit's decision does not conflict with the Second Circuit's decision in *Fitzpatrick*.[2]

Just as the Third Circuit declined to decide the Eleventh Amendment issue because of the deficient record, so too should this Court postpone its review of the case until a full and complete record has been established.[3]

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2. The two district court cases which petitioners suggest are in conflict with the Third Circuit's decision, *Flesch v. Eastern Pennsylvania Psychiatric Inst.*, 434 F. Supp. 963 (E.D. Pa. 1977) and *21 Properties, Inc. v. Romney*, 360 F. Supp. 1322 (N.D. Tex. 1973), are factually distinguishable from *Blake*. *Blake* involves a retirement system whose board is not subject to state control and whose fund is made up primarily of contributions by non-state employees and non-state employers. The retirement boards in *Flesch* and *21 Properties* were controlled by the state and their retirement funds were made up primarily of contributions by the state and state employees. 434 F. Supp. at 977-78 and 360 F. Supp. at 1325-26.

3. Petitioners finally contend that a writ of certiorari should be granted because the decision of the Third Circuit is in direct conflict with a Pennsylvania appellate court decision, *United Brokers Mortgage Co. v. Fidelity Philadelphia Trust Co.*, 26 Pa. Cmwlth., 260, 363 A.2d 817 (1976). *United Brokers*, a decision of the Commonwealth Court sitting as a court of original jurisdiction, did not involve an Eleventh Amendment issue and was properly considered by the Third Circuit. *See* 612 F. 2d at 726-27 n. 17.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Gordon W. Gerber
Arthur H. Rainey
Fred T. Magaziner
Richard A. Deak
Attorneys for Respondent

Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102